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No. 4281

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

R. C. WETHERALL, JR, AND PAUL PRICE

Appellants

v,

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, AND BURL A. SAWYERS, AS STATE ROAD COMMISSIONER,

Appellees

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

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STATEMENT FOR THE CASE

On October 28, 1960, Appellant Price was awarded a contract by appellee State Road Commission involving certain road, dam and causeway construction. On November 29, 1960, Price and appellant Wetherall entered into a contract whereby Wetherall would perform all of the work called for in Price's contract with the State Road Commission and, in return, would receive 90% of the money to be paid Price. At no time was appellee informed of this clandestine agreement and during the course of the work, which dragged on for some time after the scheduled completion date, various subterfuges were employed to disguise the true status of the person actually performing the work.

Upon completion and acceptance of the project, a dispute arose between Price, who still represented himself as having performed the work, and the State Road Commission, over certain provisions in the work specifications. It was only then that appellant Wetherall came upon the scene and commenced a declaratory judgment action in the Circuit Court of Kanawha County, West Virginia, naming Price, the Road Commission and its Commissioner as defendants. This action, filed - September 24, 1963, asked:

1) That a certain provision of the contract between Price and the Road Commission be interpreted and the rights of the parties declared; and,

2) that after an interpretation and declaration of rights, the Road Commissioner be compelled to perform his statutory duty to audit Price's claim for the extra work allegedly performed.

Appellant Price subsequently asked leave of court to become a cross-claimant and such petition was granted.

On May 21, 1964, the Circuit Court of Kanawha County entered its final order sustaining appellees' motion to dismiss appellants' complaint and cross-claim. It is this judgment order from which relief is sought..

MOTION TO DISMISS

Appellees, pursuant to Rule 16 of the Revised Rules of The Supreme Court of the United States, move that the 'jurisdictional

statement of appellants be dismissed on the ground that the judgment rest on an adequate non-federal basis; and, that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on in the court below.

ARGUMENT

I

It is manifestly clear that the dismissal of the complaint as to appellant Wetherall was based on an adequate non-federal ground, that is, he was not a real party in interest as contemplated by Rule 17 (a) of the West Virginia Rules of Civil Procedure. (see appendix A.) It is noted that the West Virginia and Federal provisions are very similiar. The trial court correctly held that Wetherall was not within the scope of Rule 17 (a) since:

> "Most authorities agree that the real party in interest is the party who,
> by the substantive law, possessed the right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery." 2 Federal Practice and Procedure, Barron and Holtzoff, §482, page 7, et. seq.

Rule 17 (a) of the Federal Rules of Civil Procedure has been construed to require that actions shall be prosecuted in the name of the real party in interest who is the person owning, either legally or eqtitably, the claim upon which relief is sought, according to the substantive law of the state. Rosenfeld v. Continental Building Operating Co., 135 F. Supp. 465; Capo v. C-O Two Fire Equipment Co., 93 F. Supp. 4. Rule 17 (a) 's intent is to require that the action be prosecuted in the name of the party, who,by the substantive law, has the right sought to be enforced. Rock Drilling etc. v. Mason et al, 217 F2 687; (cert. denied 349 U.S. 915). 3 Moore's Federal Practice (2nd Ed.) pp. 1305-1311.

In Ison et al v. Crisp Corp., 146 W.Va. 786, the West Virginia court quotes with approval the following language from German Alliance Insurance Company v. Home Water Supply Co. 226 U.S. 220: "* * * a contract is only intended for the benefit of those who made it.

Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he

must at least show that it was intended for his direct benefit." (Emphasis supplied).

Appellant Wetherall sought the construction of a contract to which he was not a party. The decision of the trial court, found as Appendix A to Appellants' Jurisdictional Statement, shows that more than a month elapsed between the date of the contract between Price and Appellees' and the date of the "employment contract" between appellants. By various stratagems and for unknown reasons, appellants conspired to convince appellees' agents that Price was actually the party performing the work. The contract performance bond listed Price as the principal and one wonders whether Wetherall would have come forward so quickly had Price been sued on his bond. The facts are plain that Wetherall was not a party to the contract and, that if he has any cause of action, it is against Price.

II

The judgment of the Circuit Court of Kanawha County also rests on an adequate non-federal ground in dismissing Price's cross-claim since the court did not preclude Price from any relief at all, but merely told him that he was proceeding in the wrong manner. Since there is no doubt that a proceeding in mandamus would only lie where there is involved the performance of a plain legal duty, not involving the performance by public officials of discretion or judgment, Draper v. Anderson, 102 W.Va. 633, it becomes evident that Price should have resorted to the claims procedure established in the State of West Virginia. Chapter 14, Article 2 of the Code of West Virginia (Michie) states:

"The purpose of this article is to provide a simple and expeditious method for the consideration of claims against the state that because of the provisions of section thirty-five, article six of the constitution of the state, and of statutory restrictions, inhibitions or limitations, cannot be determined in a court of law of equity; and to provide for proceedings in which the state has a special interest."

Prior to 1953, these matters came under the State Court of Claims, but now they are administered by the Attorney General, who, like the Court of Claims," * * * is hereby authorized to act as a special instrumentality of the legislature for the purpose of considering claims against the state, which because of the provisions of section thirty-five, article six of the constitution of the state, * * * " cannot be heard in a court of law * * *." Code 14-2-3.

(Section 35, Article VI is the governmental immunity from suit provision.)

Code 14-2-4 confers the Attorney General's jurisdiction:

"The jurisdiction of the attorney general, under the provisions of this article, except for the claims excluded below, shall extend to the following matters:

"1. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state or any of its agencies, which the state as a sovereign commonwealth should in equity and good conscience discharge and pay.

"2. Claims and demands, liquidated and unliquidated, ex-contractu and ex-delicto, which may be asserted in the nature of set-off or counterclaim on the part of the state or any of its agencies.

"3. The legal or equitable status, or both, of any claim referred to the attorney general by the head of a state agency for advisory determination."

Code 14-2-5 provides:

"The jurisdiction of the attorney general shall not extend to any claim:

"1. For loss, damage, or destruction of property or for injury or death incurred by a member of the militia or national guard when in the service of the state.

"2. For injury to or death of an inmate of a state penal institution.

"3. Arising out of the care or treatment of a person in a state institution.

"4. For a disability or death benefit under chapter twenty-three of this Code.

"5. For unemployment compensation under chapter twenty-one-a of this Code.

"6. For relief or public assistance under chapter nine of this Code.

"7. With respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state."

There is nothing in the record to show that Price attempted to avail himself of the easily accessible claims procedure.

Appellant Price enjoyed the choice of another course of action as well in that, since he complains that his property has been taken without due process, he could have instituted proceedings to have

the Road Commissioner condemn his property by eminent domain.

Article III, Section 9 of the Constitution of West Virginia states, in part,:

> ''Private property shall not be taken or damaged for public use without just compensation.''

Appellees admit that the concept of Eminent Domain as it pertains to property other than real property or interests therein is not as well known as the realty aspect. It must be noted, however, that the concept is not unknown in several jurisdictions.

Speaking of the Federal Constitutional provision that private property shall not be taken for public use without just compensation, it has been said:

> ''The Constitutional provision is addressed to every sort of interest the citizen may possess.''

U.S. v. General Motors, 323 U.S. 373; U.S. v. Certain Lands, etc, 220 F. Supp. 696.

In the case of Graham v. City of Duncan, 354 P2d 458, the syllabus by the Oklahoma court states:

> ''The term 'property' as used in the Oklahoma constitution... regarding the taking of private property for public use for which just compensation must be paid includes not only real estate held in fee, but also easement; personal property and every valuable interest which can be enjoyed and recognized as property.''

The case of Lynch v. U.S., 292 U.S. 571, has held that a valid contract was property.

It is believed that Price could have, and still can, avail himself of the remedy of mandamus; not a mandamus as envisioned in Draper (supra) but rather a mandamus to compel the State Road Commissioner to institute eminent domain proceedings against his 'property.' A full hearing on the facts is assured and the discretion of the Commissioner is not forced. The following cases state that such a mandamus action will be as pertaining to real estate. State v. Graney, 143, W.Va. 643; Riggs v. State Road Commissioner, 120 W.Va. 298; Hardy v. Simpson, 118 W.Va. 440; Childers v. State Road Commissioner, 124 W.Va. 233.

III

It is evident from the record, and from appellants' jurisdictional statement that the issue of the repugnance of Section 35, Article VI

of the West Virginia Constitution to any provisions of the Federal Constitution was not raised in a timely fashion.

Section 1257 (2), Title 28, United States Code, relied upon by Appellants for their jurisdiction before this Court, requires that the repugnance be raised by timely insistence in the state court. In Raley v. State of Ohio, 360 U.S. 423, this Court stated :

> "It is essential to our jurisdiction on appeal . . . . that there be an explicit and timely insistence in the state courts that a state statute, as applied, is repuguant to the Federal Constitution."

In Slagle v. Ohio, 366 U.S. 259, it is held that appellants must show that a "timely" insistance was made in the state courts and that a state statute as applied is repugnant to the Federal constitution. Otherwise, an appeal will be dismissed.

An examination of the complaint originally filed by Wetherall, and later ratified by cross-claimant Price, fails to disclose any mention of the alleged taking without due process of law. (See Appendix G and Appendix H in Appellants Jurisdictional Statement) The opinion of court below, reproduced as Appendix A in Appellants' Jurisdictional Statement, makes no specific or general mention of the issue of due process.

Subsequently, appellants procured an order of the trial court stating that the

> "application of section 35, Article VI of the Constitution of West Virginia, to this case would deprive (appellants) of their property without due process of law contrary to section 1 of the 14th Amendment to the Federal Constitution."

It will be noted (Appendix F, Appellants' Jurisdictional Statement) that Appellees strenuously objected and excepted to this on the grounds that the assertion was not shown on the record. This subsequent court order, which was not secured until June of 1965, is the first instance wherein the Federal questions are raised.

CONCLUSION

As noted in appellant's jurisdictional statement at page 12, this case is similiar in many respects to Appeal No. 144, October, 1965, term of this Court. It cannot be too strongly urged that this Court should not take jurisdiction of this case for the reasons as set out herein. It is believed that appellants are not within the purview of 28 USC §1257 and it is respectfully submitted that their ju-

risdictional statement should be dismissed.

September 2, 1965

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APPENDIX A

Rule 17.

Parties Plaintiff and Defendant; Capacity

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, or any other fiduciary, or a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by law may sue in his own name without joining with him the party for whose benefit the action is brought; and in subrogation and similar cases, the court shall apply this subdivision as will promote justice. When a law of the State so provides, an action for the use or benefit of another shall be brought in the name of the state or any political subdivision thereof.

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